

☐ **EXPEDITE** (if filing within 5 court days of hearing)

☐ Hearing is set:

Date: _____

Time: _____

Judge/Calendar: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

PREMERA, a Washington non-profit
miscellaneous corporation; and
PREMERA BLUE CROSS, a Washington
non-profit corporation,

Petitioners,

v.

MIKE KREIDLER, Insurance
Commissioner for the State of
Washington,

Respondent.

No. 03 2 00112 8

PETITION FOR JUDICIAL REVIEW

PREMERA and Premera Blue Cross (collectively, "Premera"), for their Petition
for Judicial Review of an order of the Insurance Commissioner of the State of Washington
(the "Commissioner") pursuant to chapter 34.05 RCW, state as follows:

I. Name And Mailing Address Of Petitioners.

John P. Domeika, Senior Vice President and General Counsel
Premera Blue Cross
7001 220th St. S.W.
Building 3, M.S. 316
Mountlake Terrace, WA 98043-2124

PETITION FOR JUDICIAL REVIEW - 1

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1
2 **II. Name And Address Of Petitioners' Attorneys.**

3 Robert B. Mitchell
4 Carol S. Arnold
5 Preston Gates & Ellis LLP
6 IDX Tower
7 925 Fourth Avenue, Suite 2900
8 Seattle, WA 98104-1158

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10 **III. Name And Address Of Agency.**

11 Office of the Insurance Commissioner
12 5000 Capitol Blvd.
13 Tumwater, WA 98501

14
15 **IV. Agency Action At Issue.**

16 Third Order: Ruling On Premera's Objections To The Case Management Order
17 served on December 23, 2002 in *In the Matter of the Application regarding the*
18 *Conversion and Acquisition of Control of Premera Blue Cross and its Affiliates*, Office of
19 the Insurance Commissioner, Docket No. G02-45 ("Third Order"). A copy of the Third
20 Order is attached hereto as Exhibit A.

21
22 **V. Parties To The Adjudicative Proceeding.**

23 Premera and the staff of the Office of the Insurance Commissioner.

24
25 **VI. Factual Basis For Review.**

1. On May 30, 2002, petitioners advised the Office of the Insurance
Commissioner ("OIC") of their intent to reorganize Premera Blue Cross and certain of its
affiliates from Washington non-profit corporations to for-profit business corporations. On
September 17, 2002, Premera filed a "Statement Regarding the Acquisition of Control of a
Domestic Health Carrier and Domestic Insurer" ("Form A Statement"), the formal
statement required for approval of the reorganization. Premera supplemented the Form A
Statement on September 27, 2002 and October 25, 2002.

1 2. Review and approval of the Form A Statement is governed by the criteria
2 set forth in the Insurer Holding Company Act, chapter 48.31B RCW (the “Insurer Act”)
3 and the Holding Company Act for Health Care Service Contractors and Health
4 Maintenance Organizations, chapter 48.31C RCW (the “Health Care Service Contractors
5 Act”) (collectively, the “Holding Company Acts”).

6 3. The Holding Company Acts require the Commissioner to “approve [the
7 transaction] within sixty days after he or she declares the [Form A Statement] to be
8 complete and . . . after holding a public hearing.” RCW 48.31B.015(4)(b); RCW
9 48.31C.030(4). In addition, the Health Care Service Contractors Act provides:

10 Unless the commissioner declares the [Form A Statement] to be
11 incomplete and requests additional information, the statement is deemed
12 complete sixty days after receipt of the statement by the commissioner. If
13 the commissioner declares the statement to be incomplete and requests
14 additional information, the sixty-day time period in which the statement is
15 deemed complete shall be tolled until fifteen days after receipt by the
16 commissioner of the additional information. If the commissioner declares
17 the statement to be incomplete, the commissioner shall promptly notify the
18 person filing the statement of the filing deficiencies and shall set forth
19 with specificity the additional information required to make the filing
20 complete

21 RCW 48.31C.030(4).

22 4. The Holding Company Acts set forth in detail the information that must be
23 provided in a Form A Statement. RCW 48.31B.015(2)(a)-(l); RCW 48.31C.030(2)(a)-(l).
24 The OIC regulations implementing the Holding Company Acts also require that an
25 applicant “shall provide the required information on Form A, hereby made a part of this
regulation.” WAC 284-18A-350. The OIC rules specify the format and detailed contents
of the Form A Statement. WAC 284-18A-910. The completeness of a Form A Statement
is necessarily judged by its conformity with these statutory and regulatory requirements.

1 In addition to setting forth the required content of a Form A Statement, the Holding
2 Company Acts establish criteria for evaluating a proposed transaction. RCW
3 48.31B.015(4)(a); RCW 48.31C.030(5)(a).

4 5. The Third Order concludes that Premera's Form A Statement will not be
5 considered "complete" until the Commissioner is "satisfied that Premera has supplied all
6 the information needed to address the statutory considerations." Third Order at 6. The
7 Third Order states:

8 I specifically want Premera to further explain the nature and effects of its
9 proposed transaction in light of any questions or problems raised by the
10 OIC Staff and its experts. I will consider such responsive reports as
11 further supplementing Premera's [Form A] Statement.

12 *Id.* at 7 (emphasis added).

13 6. The Third Order further concludes that the 60-day timeframe set forth in
14 the Holding Company Act is "directory and permissive," not a "mandatory requirement."
15 Third Order at 9.

16 7. The Third Order denies Premera's Motion for Partial Reconsideration and
17 Clarification of the First Order: Case Management Order ("First Order") entered on
18 October 24, 2002, which provided, *inter alia*, that the Form A Statement "will not be
19 considered complete until the adjudicative hearing has concluded and the administrative
20 record is closed." First Order at 2.

21 8. The Holding Company Acts permit the Commissioner to conduct an
22 investigation, order production of books and records, and retain experts to assist in his
23 review and investigation of the proposed transaction. RCW 48.31B.0154(c); RCW
24
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1 48.31C.040(4)(b); RCW 48.31C.070. *See also* RCW 34.05.446; WAC 10-08-120.

2 9. Discovery by the OIC and its consultants in connection with their review
3 and examination of Premera's Form A Statement has been extensive. Consultants
4 engaged by the OIC Staff have submitted hundreds of data requests and document
5 requests to Premera. *See* Third Order at 4-5. In response, Premera has provided over
6 twenty-two thousand pages of documents for review and inspection, responded to
7 numerous written data requests, and offered its senior management for lengthy interviews
8 by the OIC Staff and its experts. The OIC Staff anticipates that additional interviews and
9 data and document requests may be necessary. *Id.* at 5. The OIC Staff, moreover, has
10 informed Premera that production of the requested information "may identify other
11 documents or information necessary for our review." Letter, James T. Odiorne, Deputy
12 Insurance Commissioner to John P. Domeika, Premera General Counsel (Nov. 19, 2002).

13 10. The Commissioner has announced that an adjudicative hearing will be held
14 as part of the proceedings to consider the reorganization described in Premera's Form A
15 Statement. First Order at 2. Under Washington law, the record of an adjudicative
16 proceeding consists of all evidence, the hearing and its transcript, and other submissions to
17 the agency. RCW 34.05.476; WAC 10-08-00110-08-140.

18 11. The Third Order finally determines and impairs Premera's legal right to a
19 prompt determination on its Form A Statement. Premera is aggrieved and adversely
20 affected by the Third Order because (1) the agency interpretation of the law ignores the
21 statutory and regulatory criteria for determining whether Premera's Form A Statement is
22 complete and jeopardizes Premera's statutory right to an administrative decision within 60
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1 days; (2) Premera's interests are among those the agency is required to consider in taking
2 action; (3) Premera is prejudiced or is likely to be prejudiced by the Third Order because
3 the proposed reorganization is time-sensitive (*see* Third Order at 7); and (4) a judgment in
4 favor of Premera would substantially redress that prejudice. *See* RCW 34.05.530.
5

6 **VII. Reasons Why Relief Should Be Granted.**

7 **A. The Third Order Erroneously Interprets And Applies The Law.**

8 12. Premera should be granted relief because the Third Order erroneously
9 interprets and applies the law. RCW 34.05.570(3)(d). Upon review, this Court may
10 substitute its interpretation of the law for that of the agency. *Overlake Fund v. Shoreline*
11 *Hearings Bd.*, 90 Wn. App. 746, 954 P.2d 304 (1998).

12 13. The Third Order departs from Holding Company Acts in at least two
13 respects. First, it ignores explicit statutory provisions for the content of a Form A
14 Statement and imposes additional requirements that are both open-ended and
15 indeterminate. Second, it undermines the legislative mandate for a decision within 60
16 days after the Form A Statement is complete.

17 14. The Holding Company Acts prescribe the information required to comprise
18 a complete Form A Statement. The Third Order incorrectly assumes that a complete Form
19 A Statement includes all of the information adduced during the agency's discovery and
20 investigation regarding the Form A Statement and all of the administrative record related
21 to the Form A Statement. By predicated completion of the Form A Statement upon
22 resolution of "questions or problems raised by the OIC Staff and its experts," the Third
23 Order confuses the substance of the Form A Statement with the full review and
24 investigation.
25

1 15. Because it provides that the Form A Statement cannot be complete until the
2 OIC Staff has concluded its investigation and discovery, the Third Order in effect stops
3 the clock on the 60-day period. By including Premera's responses to the OIC Staff's
4 "questions or problems" posed during discovery and investigation with the specific
5 information identified by statute to be included in the Form A Statement, the Third Order
6 creates an endless loop in which a Form A Statement may never be "complete."

7 16. The Third Order also incorporates the erroneous interpretation of the law
8 that the Form A Statement will not be considered "complete" until the adjudicative
9 hearing has concluded and the administrative record has closed. Under the Health Care
10 Service Contractors Act, the Form A Statement is deemed "complete" 60 days after
11 receipt unless the Commissioner declares the statement to be incomplete and specifies the
12 additional information required to make the filing complete, in which case the 60-day time
13 period is tolled for fifteen days. RCW 48.31C.030(4). The agency's interpretation of the
14 Health Care Service Contractors Act defeats the mandatory 60-day deadline in which the
15 Form A Statement must be deemed or declared "complete."

16 17. The agency interpretation of the law further ignores the Holding Company
17 Acts requirement that the agency must reach a decision on whether to approve the Form A
18 Statement within 60 days after it is complete. RCW 48.31B.015(4)(b); RCW
19 48.31C.030(4). By incorporating the conclusion that the Form A Statement will not be
20 considered "complete" until the adjudicative hearing has concluded and the administrative
21 record has closed, the Third Order renders the 60-day deadline for decision meaningless.
22 Under this interpretation, the agency could prolong the approval process by demanding
23 ever more information, refusing to declare the Form A Statement complete, setting a
24 hearing date far off into the future, or keeping the administrative record open for years.

1 18. The Third Order incorrectly concludes that the 60-day timeframes set forth
2 in the Holding Company Acts are “directory and permissive.” To the contrary, the
3 Holding Company Acts’ language is mandatory, and the agency must comply with the
4 statutory deadlines.

5 **B. The Third Order Is Outside The Authority Of The Agency.**

6 19. The agency has no authority to interpret the plain language of the Holding
7 Company Acts in a manner that alters or amends the statute. *In re George*, 90 Wn.2d 90,
8 97, 579 P.2d 354 (1978). The Holding Company Acts spell out precisely what is to be
9 included in a Form A statement. They also expressly provide that the Commissioner
10 “shall approve an exchange or other acquisition of control . . . within sixty days after he or
11 she declares the statement filed under this section to be complete. . . .” RCW 48.31B.015;
12 RCW 48.31C.030(4) (emphasis added).

13 20. By interpreting the statute in a manner that both ignores the standards for
14 judging the Form A Statement “complete” and nullifies the statutory 60-day deadline for a
15 decision on the statement, the agency is acting outside the scope of its delegated authority.
16 RCW 34.05.570(3)(b).

17 **C. The Third Order Is Inconsistent With The OIC’s Rules And Fails To**
18 **State Facts And Reasons To Demonstrate A Rational Basis For The**
19 **Inconsistency.**

20 21. An agency order in an administrative proceeding is subject to judicial
21 review when the order is inconsistent with the agency’s duly adopted regulations and no
22 facts or reasons are stated to demonstrate a rational basis for the inconsistency. RCW
23 34.05.570(3)(h). Here, the Third Order is inconsistent with the OIC’s regulations that
24 specify the form and content of the Form A Statement. WAC 284-18A-910. The Third
25 Order is also inconsistent with the OIC’s regulations providing that the 60-day review and

1 approval period begins on the date the Form A Statement is “complete.” WAC 284-18A-
2 350; WAC 284-18-300.

3 22. The OIC regulations do not allow the agency to change the required
4 content of the Form A Statement or to delay the trigger date for the 60-day period for
5 review and approval. The only rationale given in the Third Order for this inconsistency is
6 the desire to obtain answers to “questions or problems raised by the OIC Staff and its
7 experts.” Third Order at 7. However, the Form A Statement need not include the answers
8 to such “questions or problems”: they will be addressed through Premera’s responses to
9 the OIC Staff’s examination and discovery requests. RCW 48.31B.0154(c); RCW
10 48.31C.040(4)(b); RCW 48.31C.070; RCW 34.05.446; WAC 10-08-120. The
11 Commissioner’s decision will be based on the full administrative record, including the
12 evidence adduced in discovery or at the hearing, not just the information contained on the
13 Form A Statement. The Third Order, therefore, violates the OIC’s own regulations with
14 no rational basis stated for the inconsistency.
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17 **D. The Third Order Does Not Decide All Issues Requiring Resolution.**

18 23. Judicial review is required because the Third Order does not decide all
19 issues requiring resolution in connection with the completeness of the Form A Statement.
20 RCW 34.050.570(3)(f). When a Form A Statement is declared incomplete, the Health
21 Care Service Contractors Act requires the agency to “set forth with specificity the
22 additional information required to make the filing complete.” RCW 48.31C.030(4)
23 (emphasis added). The Third Order does not set forth “with specificity” any additional
24 information needed to make the Form A Statement complete.
25

1 24. Contrary to statute, the Third Order states that Premera's Form A
2 Statement must further explain the transaction "in light of any questions or problems
3 raised by the OIC Staff and its experts." Third Order at 7. As the OIC Staff's letter of
4 November 19, 2002, states, any information provided by Premera may trigger production
5 of "other documents or information." By failing to inform Premera "with specificity"
6 what information is needed to complete the Form A Statement, the Third Order invites an
7 endless loop of questions and requests to Premera. The agency, therefore, should be
8 required to comply with the statutory requirement to inform Premera "with specificity"
9 what information – if any – is required to complete the Form A Statement.
10

11 **VIII. Request For Relief.**
12

13 WHEREFORE, pursuant to RCW 34.05.574, Premera requests the following
14 relief:

- 15 1. An Order declaring that:
- 16 A. The Holding Company Act mandates that the Commissioner
17 approve or disapprove the Form A Statement within 60 days after
18 the Form A Statement is deemed or declared complete;
- 19 B. The completeness of the Form A Statement must be determined in
20 light of the requirements set forth in RCW 48.31C.030(4), RCW
21 48.31B.015(4)(b), WAC 284-18A-350, and WAC 284-18-300;
- 22 C. The Holding Company Acts do not contemplate that the
23 completeness of the Form A Statement is dependent upon responses
24 to discovery or examination requests, evidence adduced at the
25 adjudicative hearing, or the completion of the administrative record;

1 D. The Third Order violates Washington law and is therefore outside
2 the authority of the Commissioner;

3 E. The Third Order is inconsistent with the OIC's rules and
4 regulations, as set forth herein, and fails to state facts and reasons
5 that demonstrate a rational basis for the inconsistency;

6 F. The agency action in the Third Order is arbitrary and capricious;

7 G. The Third Order finally determines and impairs Premera's legal
8 rights to a timely decision on its Form A Statement; and

9 H. Premera is aggrieved and adversely affected by the Third Order
10 within the meaning of RCW 34.05.530.

11 2. An Order remanding the matter to the agency with instructions to identify
12 with specificity the additional information, if any, that is missing from the
13 Form A Statement and is required to render the Form A Statement
14 complete, consistent with the specific requirements of RCW
15 48.31B.015(2)(a)-(l), RCW 48.31C.030(2)(a)-(l), and WAC 284-18A-910,
16 or, in the alternative, to declare the Form A Statement complete.

17 3. All other just and equitable relief.
18
19

20 DATED this 21st day of January, 2003.

21 PRESTON GATES & ELLIS LLP
22

23 By _____
24 Robert B. Mitchell, WSBA # 10874
25 Carol S. Arnold, WSBA # 18474
Attorneys for Petitioners